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No. 82-1897

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether officers of a fraternal benefit association may be considered "employees" for purposes of the Age Discrimination in Employment Act.

2. Whether eligibility for election as an officer of a fraternal benefit association is an employment opportunity within the purview of the Age Discrimination in Employment Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 694 F.2d 1068. The opinion of the district court (Pet. App. A7-A18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1982. A petition for rehearing was denied on February 23, 1983. The petition for a writ of certiorari was filed on May 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a nonprofit benevolent association which sells insurance to its members, maintains a nursing home, and supports educational and religious programs (Pet.

App. A2). The highest legislative powers of the Association are vested in the Convention, a group comprising a Board of Directors, members of a Court of Appeals, and delegates from the local Branches of the Association (*id.* at A8). From among the delegates, the Convention elects the officers of the Association for four year terms (C.A. App. 176).[1] The Convention also fixes the officers' salaries (*id.* at 177). The officers' duties are set out in the bylaws, which can be amended by the Convention (*id.* at 174). Officers who fail conscientiously to fulfill their duties are subject to dismissal (*id.* at 177).

Article X(a) of petitioner's bylaws states that the Association's officers shall also constitute the Board of Directors (Pet. App. A3; C.A. App. 174).[2] Although the officers are paid a salary for the work they perform as officers (C.A. App. 177), they are not compensated for the work they perform as directors (*id.* at 174-175).

Article XII, Section 1(e), of petitioner's bylaws sets out requirements for employment as an officer of the association. It includes a provision stating (Pet. App. A10; C.A. App. 176):

> Any delegate of the Association who is 66 years or under on the first day of the new term is eligible for nomination, election, or appointment to the Board of Directors.

Because officers must also serve on the Board of Directors, delegates who are over 66 years of age are thus ineligible to serve as officers.

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] Article X(a) states:

> The members of the Board of Directors shall be the elected officers defined in Article XII, Officers, Section 1 in General, subparagraph (a).

2. From at least 1976 until January 29, 1980, Frances Mizenko and Anna Hook worked full-time as officers of the Association. Mizenko earned $25,000 per year as Secretary of the Association (C.A. App. 51, 56, 60, 64, 68). Her duties included managing the office, maintaining records, publishing monthly statements and the annual report, and receiving all money due the Association (*id.* at 179-180). Hook, who had been Secretary of the Junior Order since at least 1976, earned $15,000 per year (*id.* at 51, 56, 60, 64, 68). Her duties included receiving all money due the Junior Order, publishing monthly and annual reports, preparing financial statements, and keeping the records for all membership applications (*id.* at 181).

As officers of the corporation, Mizenko and Hook were also members of the Board of Directors, as required by Article X(a). When their four-year terms as officers expired, they were over 66 years of age. They were thus ineligible to be considered for reelection to the jobs they were then holding, due to the operation of Article XII, Section 1(e), which prohibits the election of delegates over the age of 66 to the Board of Directors (Pet. App. A5-A6). They were retired on January 29, 1980 (C.A. App. 68) and filed complaints of age discrimination with the Equal Employment Opportunity Commission.

3. The Commission then filed this action on their behalf, pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. 626(b), alleging that the Association's rule prohibiting delegates or incumbent officers over age 66 from serving on the Board of Directors violates Section 4(a) of the Act, 29 U.S.C. 623(a). (C.A. App. 4.)

The district court granted the Association's motion for summary judgment, holding that it lacked subject matter jurisdiction over the case because the ADEA does not cover

"officers and directors who are elected" (Pet. App. A17). The court held that Section 4(a)(1) of the Act—which makes it unlawful "to fail or refuse to hire or to discharge any individual * * * because of such individual's age"—does not apply where a worker obtains her position through an election, and then loses it "in accordance with corporate By-Laws" (Pet. App. A13).

4. The court of appeals reversed, holding that petitioner's officers were employees covered by the ADEA since they "performed traditional employee duties[,] * * * were responsible for their work to the governing body of the organization and * * * drew salaries as employees" (Pet. App. A5). The court held that "[t]heir participation on the policy-making Board of Directors does not detract from their primary role as employees" (*ibid.*). The court therefore concluded that the age limitation imposed on officers by petitioner's bylaws violates the ADEA.

ARGUMENT

1. Petitioner argues (Pet. 13-17) that the court of appeals erred in looking to the actual duties performed by petitioner's officers, rather than to various factors concerning their selection and tenure, in determining whether they were "employees" within the meaning of the ADEA. This argument is without merit. Although there is some variation among the courts of appeals regarding the details of the test to be used in determining employees' status under federal legislation such as the ADEA, all courts agree that the starting point is the actual working relationship between the parties. See, *e.g.*, *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341-342 (11th Cir. 1982) (Title VII); *Spirides* v. *Reinhardt*, 613 F.2d 826, 831-833 (D.C. Cir. 1979) (Title VII); *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297, 302-303 (5th Cir. 1975) (Fair Labor Standards Act); *Hickey* v. *Arkla Industries, Inc.*, 699 F.2d 748, 751-753 (5th Cir. 1983) (ADEA).

The court of appeals correctly examined the entire relationship between the parties to determine whether petitioner's officers should be treated as employees under the ADEA. Only after scrutinizing the nature of the tasks performed by petitioner's officers, their relationship with petitioner's governing body, and how they were paid, did the court determine that they should be treated as "employees" for purposes of the Act (Pet. App. A5).

Petitioner nonetheless argues that its officers cannot be considered employees because they are chosen "through a democratic, electoral process" (Pet. 15). But the ADEA, though it expressly excludes employees "elected to public office in any State or political subdivision of any State" (29 U.S.C. 630(f)), does not otherwise distinguish among employees on the basis of the manner of their selection. Its application is not confined, as petitioner contends (Pet. 14-15), to those who are "hired" in the most typical fashion. Rather, Section 4(a) makes it unlawful

> (1) to fail or refuse to hire * * * *or otherwise discriminate* against any individual * * * because of such individual's age;
>
> (2) to limit, segregate, or classify * * * employees in any way which would deprive or tend *to deprive any individual of employment opportunities* * * * because of such individual's age * * *.

29 U.S.C. 623(a)(1) and (2) (emphasis added). Under the Act it makes no difference that the deprivation of employment opportunities is caused by one person or by a group.

Nor is it relevant, as petitioner suggests, that the Association's officers have "no expectation of a continuous tenure" (Pet. 15). An "employee" under the ADEA is "an individual employed by any employer" (29 U.S.C. 630(f)), and it is immaterial whether he holds his job at will, cf. *NLRB* v. *Waterman Steamship Co.*, 309 U.S. 206, 219 (1940), or for a

fixed period, *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825 (3d Cir. 1981).

Finally, it is not decisive that petitioner's officers are "managerial executives," not "clerical and maintenance personnel" (Pet. 13, 14). It is well settled that both groups are covered by the ADEA. See, *e.g.*, *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914, 916 (2d Cir. 1981) (vice president); *Simmons* v. *McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980) (administrator of nursing home and nonvoting member of board of directors). Cf. *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979) (secretary of company and member of board of directors (Title VII)). See also 29 U.S.C. (Supp. V) 631(c)(1) (ADEA permits compulsory retirement of certain "[b]ona fide executives [and] high policymakers").

2. Petitioner also argues that the legislative history of Title VII, 42 U.S.C. (& Supp. V) 2000e *et seq.* — which this Court has said bears "important similarities" to the ADEA, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)—shows that corporate board members (and by analogy its own directors) are not to be considered "employees" (Pet. 10-13). But the court of appeals here held only that the ADEA prohibits petitioner from indirectly imposing an age limit on employment as an *officer* of the Association by tying eligibility to an age-restricted status—membership on the board of directors. Under the court's ruling, petitioner need not change its eligibility requirements for board membership in order to comply with the ADEA. If it wishes to retain the age limitation, it can cease using board membership as a qualification for employment as an officer. The court thus did not hold that members of petitioner's board of directors must be considered employees.

As we made clear above (page 5), the court of appeals correctly determined that, based on their actual working relationship with petitioner, its officers are employees for purposes of the ADEA. Petitioner's argument amounts to a contention that these employees lose the protection of the ADEA because the Association requires that they also serve on its board of directors. There is no support in the Act or the case law for this approach, which, if accepted, would create an unwarranted gap in the protection that Congress provided against age discrimination in employment. When a person performs separate work as an officer, and is compensated for that work, an employer cannot escape the obligations of its employment relationship by arguing that the officer is also a director, and so not an employee. Cf. *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297, 1302 (9th Cir. 1982), petition for cert. pending, No. 82-1699 (company which ties employment to stock ownership cannot avoid Title VII by arguing that it does not apply to discrimination in the sale of stock).

Petitioner's reliance on *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), cert. granted, No. 82-940 (Jan. 24, 1983) is misplaced. In *Hishon* the Eleventh Circuit held that Title VII does not apply to discrimination in partnership decisions in law firms, because partners are not "employees" under that Act. That is so, the court held, because partners both own and control the business, and share in its profits and losses. It would thus be inappropriate to consider them employees of the partnership (678 F.2d at 1028). Petitioner's officers, by contrast, have no ownership interest in the Association, and do not share in any profits or losses. Nor do they control the Association, whose affairs are directed by the Convention. See page 2, *supra*. As the court of appeals here noted, "[t]he election to partnership

with its corresponding opportunity to share in the partnership profits differs markedly from the 'election' to the position of officer in the FCSLA" (Pet. App. A5).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1983

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[3]Petitioner lists as one Question Presented "[w]hether eligibility for election to a position of director/officer * * * constitutes an employment opportunity within the purview of the" ADEA (Pet. I). The only discussion related to that issue appears at Pet. 14-15, where petitioner notes that its "clerical and maintenance personnel" cannot "be said to regard a position as a director/officer as an employment opportunity to which [they] may someday be promoted." But it is irrelevant to the decision of this case that petitioner may have two separate tracks of employees, and that people may be disqualified from becoming officers for reasons other than age. If officers are themselves employees, then the position of officer is an "employment opportunit[y]" (29 U.S.C. 623(a)(2)) which was denied to Mizenko and Hook because of their age.